TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 222.

GEORGE S. WILLIAMS, PLAINTIFF IN ERROR,

vs.

C. E. WINGO.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED FEBRUARY 27, 1899.

(17,310.)

(17,310.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 222.

GEORGE S. WILLIAMS, PLAINTIFF IN ERROR,

vs.

C. E. WINGO.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Record from circuit court of Giles county	2	1
Order to post notice of application	2	1
Notice of application	3	1
Application	4	2
Order to docket, &c	5	2
Order appointing viewers	6	3
Order appointing viewers	6	3
Report of viewers	7	3
Order to file report of viewers, &c	9	4
Order taking motion to quash, &c., under advisement	10	4
Order beginning hearing	11	5
Orders continuing hearing	12	5
Orders continuing hearing	13	6
Order denying motion to quash, &c	14	6
Bill of exceptions No. 1	14	6
Order granting application, &c	15	6
Certificate of clerk of county court	18	7
Judgment of circuit court	18	8

Judd & Detweiler, Printers, Washington, D. C., November 6, 1899.

	Original.	Print.
Bill of exceptions	22	9
Testimony of W. E. P. Lucas	22	9
G. W. Hines	23	9
C. P. Hudson	24	9
John F. Walker	25	10
C. E. Stafford	27	10
M. B. Franklin	28	11
James Fry	28	11
F. E. Dunklee	29	11
Ed. Bland	30	12
C. P. Tinsley	31	12
D. A. French	32	12
Wade Williams	32	12
W. D. Straley	33	13
James Hoge	33	13
G. S. Williams	35	13
C. W. Stafford	36	14
John Porterfield	37	14
C. L. Johnston	38	15
Judge's certificate to bill of exceptions	39	15
Agreement as to facts	40	15
Clerk's certificate	40	16
Order refusing writ of error	41	16
Clerk's certificate and return	41	16
Petition for writ of error	43	17
Order allowing writ of error	49	20
Writ of error	50	20
Citation	52	21
Acceptance of service of citation	53	21
Bond on writ of error	54	21

In the Supreme Court of Appeals of Virginia.

leas in the supreme court of appeals for the State of Virginia, held at the court-house of Wythe county, in the town of Wytheville, on Wednesday, the 6th day of July, 1898.

Be it remembered that heretofore, to wit, at a term of the supreme ourt of appeals for the State of Virginia held at the court-house of Vythe county, in the town of Wytheville, on Wednesday, the 6th ay of July, 1898—present, the Hon. James Keith, president; the Ion. John W. Riely, Richard H. Cardwell, John A. Buchannan, nd George M. Harrison, associate justices of the said supreme court f appeals—came Geo. S. Williams, appellant, against C. E. Wingo, ppellee, and filed his petition praying a writ of error and super-edeas to a judgment in favor of the said C. E. Wingo, rendered by he circuit court of Giles county, in the State of Virginia, and filed vith his petition a transcript of the record of said judgment of the ircuit court of Giles county; which said transcript is in the words nd figures following, to wit:

2 *Record from Circuit Court of Giles County, Va.*

Pleas at the court-house of Giles county before the circuit court of said county, at the court-house, the — day of October, 1897.

Be it remembered that heretofore, to wit, at a county court held for the county of Giles, at the court-house thereof, on Tuesday, the 14th day of June, A. D. 1896.

Present: Hon. Martin Williams, judge.

C. E. WINGO
vs.
G. S. WILLIAMS. } On Application for a Ferry.

In the matter of the application of C. E. Wingo for the establishment of a ferry from his land on the east side of New river, in Giles county, Virginia, to a point on the opposite bank, notice of said application, to be made at the September term, 1896, of this court is ordered to be posted at the front door of the court-house of this county on the first day of the July and August terms, 1896, respectively.

And at another day at said county court, to wit, on Wednes-
3 day, the 16th day of September, A. D. 1896.

This day came C. E. Wingo, by his attorney, and presented to the court a notice of his intention to make application at the September term, 1896, of this court for the establishment of a ferry across New river near Egglestons Springs, in this county; which notice is in the words and figures following, to wit:

"Notice is hereby given that I shall apply to the county court of Giles county, Virginia, at the September term, 1896, thereof, for per-

mission to establish and operate a ferry in Giles county, Virginia, across New river from a point on my land known as the Egglestons Springs property, on the east bank of said river, opposite, or nearly opposite, the depot property of the Norfolk and Western Railroad Company, at Egglestons Springs station, to a point on the west bank of said river, in Giles county, Virginia, opposite, or nearly opposite, the above-named point on the east bank of said river.

"July 14th, 1896.

"C. E. WINGO."

And proved by testimony satisfactory to the court that
4 said notice had been published at the front door of the court-house of Giles county on the first day of the two next preceding terms of this court, viz., at the July and August terms, 1896, thereof; whereupon George S. Williams, by leave of the court, entered his appearance as defendant to this motion and moved the court to quash said notice for insufficient description; which motion the court overruled, and to which ruling of the court the defendant excepted. The plaintiff presented his application in writing for the establishment of said ferry; which application is in the words and figures following, to wit:

"To the Hon. Martin Williams, judge of the county court of Giles county, Virginia:

"The undersigned, C. E. Wingo, respectfully makes application to your honor's court for permission to establish and operate a ferry in Giles county, Virginia, across New river from a point on my lands known as the Egglestons Springs property, on the east bank of said river, opposite or nearly opposite the depot property of the Norfolk and Western Railroad Company at Egglestons Springs station, to a point on the western bank of said river in Giles
5 county, Virginia, opposite or nearly opposite the above-named point on the east bank of said river, and your applicant would respectfully state that he is the owner of the land on the east bank of New river, as aforesaid, and also that he has contracted for the use of the land on the west bank of New river, as aforesaid, and your applicant prays that said permission may be had as will secure to him the privilege applied for.

"Respectfully,

C. E. WINGO,
"*By Counsel.*"

The plaintiff's motion being ordered to be docketed, the defendant moves to quash said application; which motion the court overruled, and to which ruling of the court the defendant excepted, and by consent of the parties this order shall be treated as a formal bill of exceptions to both rulings of the court before mentioned to which the defendant had excepted, and this cause is continued.

I think the order O. K. as directed.

W. J. HENSON.

J. B. PECK,
Of Counsel for Applicant.

6 And at another day in said county court, to wit, on Tuesday, the 13th day of October, 1896.

Present: Hon. Martin Williams, presiding.

In the matter of the application for the establishment of a ferry at Egglestons Springs, Giles county, Virginia, the court doth appoint Jesse H. Woodram, J. M. Peters, George W. Shumate, J. Kyle McClaugherty, and E. W. Hobbs viewers, who shall view the place for said proposed ferry and upon oath report in their opinion whether or not public convenience will result from the proposed ferry, with their reasons for such opinion, and report their proceedings to the November term, 1896, of this court. The said viewers will meet at Egglestons Springs on Friday, the 6th day of November, 1896, and proceed to discharge their duties under this order.

And at another day in said county court, to wit, on Tuesday, the 10th day of November, 1896.

Present: Hon. Martin Williams, presiding.

7 In this case George W. Shumate, one of the viewers appointed at the last term of the court, being unable to act as such, it is ordered that he be relieved, and that Lewis A. Dunn be appointed in his place, who, together with J. M. Peters, J. H. Woodram, E. W. Hobbs, and J. Kyle McClaugherty, the other viewers appointed at the last term of this court, shall meet at Egglestons Springs, in said county, on Friday, the 13th day of November, 1896, and proceed to execute the order entered in this case at the last term and make report at this term, as required by section 1376 of the Code of Virginia. Any three of said viewers may proceed to execute this order.

And at another day of the same term of said court, to wit, on Saturday, the 14th day of November, 1896, Hon. Martin Williams, presiding.

J. M. Peters, E. W. Hobbs, J. H. Woodram, and Lewis A. Dunn, viewers appointed by this court to view the place where the said ferry is proposed to be established, having returned their report in the words and figures following, to wit:

"To the Hon. Martin Williams, judge of the county court of Giles county, Virginia:

8 "Your undersigned viewers, appointed by your honor's court to view the place for the establishment of a ferry at Egglestons Springs, in Giles county, Virginia, would respectfully report that they went to said place this day in pursuance of said order and viewed the place for the said proposed ferry, and in their opinion public convenience would result from the establishment of said proposed ferry for the following reasons, viz: It would afford a more direct rout- for all travel from Newport, Mountain Lake, Sinking Creek valley, and the section of country on the east side of New river tributary to Egglestons Springs depot, on the Norfolk and Western railroad, to said depot and to other parts of Giles county on the west side of New river; also it would afford a more

direct rout- for all travel from said depot and from the section of country on the west side of New river to Newport and the other places on the east side of New river before mentioned.

The distance saved would be about one mile, and the road, in our opinion, very much better on account of grade and solidity of bottom. It would furthermore afford a highway for the con-
9 venience of travel going to and returning from the summer resort known as Egglestons Springs, and placing said watering place in easy access of the railroad depot. We recommend to your honor the establishment of the proposed ferry.

Respectfully,

J. M. PETERS.
E. W. HOBBS.
J. H. WOODRAM.
LEWIS A. DUNN.

Sworn to and subscribed before me, Bernard Mason, a notary public in and for the county of Giles, State of Virginia, the 13th day of November, 1896.

BERNARD MASON, *N. P.*

It is ordered that said report be filed with the papers in this cause, and the defendant, George S Williams, having heretofore entered his appearance in this cause, and having signified his intention to file exceptions to said report, on his motion it is ordered that that trial of this issue in this cause be continued.

And at another day in said county court, to wit, on
10 Wednesday, the 16th day of December, 1896, Hon. Martin Williams, presiding.

This day came again the parties, by their attorneys, and the defendant, G. S. Williams, by his attorney, moved the court to set aside the order sending viewers to view the proposed location, and to quash the application or petition for the ferry, and to quash the report of the viewers; to which motion the applicant, by counsel, objected, and in support of his objection offered for the court's consideration an act of the General Assembly of Virginia, approved March 5th, 1894, entitled An act authorizing the county court of Giles county to charter a ferry across New river at a point near Egglestons Springs; to the consideration of which act the defendant objected, and the court, not being fully advised, takes time to consider.

And at another day in said county court, to wit, on Monday, the 21st day of June, 1897.

Present: Hon. Martin Williams, judge of this court, and
11 the Hon. Selden Longley, judge of the county court of Pulaski county, Virginia.

C. E. WINGO
vs.
G. S. WILLIAMS. } On Application for Ferry.

In the matter of the application of C. E. Wingo for a ferry near Egglestons Springs, and also the matter of the application of C. C. Wingo & *al.* for a public road near Egglestons Springs, the Hon. Martin Williams being so situated that in his opinion it is improper for him to preside at the trial of these two applications, the Hon. Selden Longley, at that part of the court at which said two applications are tried, presides. Both applications were heard together by consent of parties, and the applicant moved the court to enter the name of George S. Williams of record as a party defendant to the road application: to which motion the said George S. Williams, by counsel, objected and refused to be entered of record as a party defendant to said application.

And at another day of the same term of said court, to wit,
12 on Tuesday, the 22nd day of June, 1897.

Present: Hon. Martin Williams, judge of said court, and Hon. Selden Longley, judge of the county court of Pulaski county, Virginia.

C. E. WINGO
vs.
G. S. WILLIAMS. } On Application for a Ferry.

This day came again the parties, by their attorneys, and the court proceeded further to hear the testimony, but not having time on this day to complete the same, it is adjourned over until tomorrow morning at 9.00 o'clock.

And at another day of the same term of said court, to wit, on Wednesday, the 23rd day of June, 1897.

Present: Hon. Martin Williams, judge of said court, and Hon. Selden Longley, judge of the county court of Pulaski county, Virginia.

C. E. WINGO
vs.
G. S. WILLIAMS. } On Application for a Ferry.

This day came again the parties, by their attorneys, and the court proceeded further to hear the testimony, but not having time on this day to fully hear the same, it is adjourned until tomor-
13 row morning at 9.00 o'clock.

And at another day of the same term of said court, to wit, on Thursday, the 24th day of June, 1897.

Present: Hon. Martin Williams, judge of said court, and Hon. Selden Longley, judge of the county court of Pulaski county, Virginia.

C. E. WINGO
vs.
G. S. WILLIAMS. } On Application for a Ferry.

This day came again the parties, by their attorneys, and the court proceeded further to hear the testimony and argument of counsel, but not having time on this day to fully hear the same, it is adjourned until tomorrow morning at 9.00 o'clock.

And at another day of the same term of said court, to wit, on Friday, the 25th day of June, 1897.

Present: Hon. Martin Williams, judge of said court, and Hon. Selden Longley, judge of the county court of Pulaski county, Virginia.

C. E. WINGO
vs.
G. S. WILLIAMS. } On Application for a Ferry.

14 This day came again the parties, by their attorneys, and the defendant, by counsel, renewed his motion to set aside the order sending viewers to view the proposed location, and to quash the application or petition for said ferry, and to quash the report of the viewers; which motions were resisted by counsel for applic*ation*, and the court overruled this motion, and the defendant excepted and tendered his bill of exceptions, which was signed, sealed, and made a part of the record.

Said bill of exceptions No. 1 is in the words and figures following, to wit:

Bill of Exceptions.

Be it remembered that in this cause the defendant moved the court to set aside the order of this court sending viewers to view the proposed location for the ferry, and to quash the report of the viewers, and to quash the application or petition for said ferry; which motion was resisted by attorney for applicant, and the court overruled said motion, and the defendant excepted and tendered this bill of exceptions, which is signed, sealed, and made a part of the record.

SELDEN LONGLEY. [SEAL.]

15 The application of C. E. Wingo for the establishment of a ferry across New river, in Giles county, from a point on his, said Wingo's, land known as the Egglestons Springs property, on the east bank of said river, at a*t* point between Egglestons Springs and Egglestons Springs depot, on the Norfolk and Western railroad, where the said ferry was viewed and recommended by the commissioners heretofore appointed by the court; which place is about opposite a point 59 poles east of said depot, on the opposite bank of said river, at the point where the new road established on the application of C. E. Wingo and M. B. Franklin comes to said river on

the east bank; and the court being satisfied that the notice required by section 1375 of the Code of Virginia has been published at the front door of the court-house of this county for the two next preceding terms of this court before the application to establish said ferry was made, and the court being of the opinion that the half-mile limit prescribed in section 1386 of the Code of Virginia does not apply to the point where the said ferry is proposed to be established, and the court being satisfied
16 from the evidence offered for and against the establishment of said ferry that public convenience will result from the establishment of said ferry as proposed, doth grant him, the said C. E. Wingo, leave to establish and operate a ferry at the said place, and the court doth designate the usual flatboat similar to those used at other ferries across said river in Giles county as the kind of boat required to be kept at said ferry, and one hand or person to be in regular attendance at said ferry. The court doth fix the following as the rates of toll or ferriage which may be charged for crossing at said ferry, viz: For each person, five cents (5); for person and horse, ten cents (10); for each horse, five cents (5); for a two-horse vehicle and driver, forty cents (40); for a four-horse vehicle and driver, sixty cents (60), and in like proportion for a larger or a smaller number; for a one-horse buggy and driver, twenty-five cents (25); for cattle, hogs, or sheep, twenty cents per score, and in like proportion for a greater or smaller number.

Wherefore it is ordered that the said ferry be established, as
17 aforesaid, and that the plaintiff recover against the defendant his costs by him about his application in this behalf expended.

The said George S. Williams having in court executed bond before the clerk thereof in the penalty of $250.00, with W. J. Henson and B. P. Watts as sureties, conditioned to pay all damages, costs, and fees which may be awarded against or incurred by him and all actual damages incurred in consequence of the supersedeas in case the said appeal and supersedeas be dismissed, an appeal is entered of right by and on behalf of said George S. Williams and at his instance and on his motion from the order of the — establishing said ferry, and also upon his further motion a writ of supersedeas, in connection with his said appeal, is awarded him against said C. E. Wingo, staying leave to establish the said ferry and the operation of said judgment, and the said supersedeas is ordered to issue in connection with said appeal, and it is ordered that the execution of this order in this case be suspended until the next term of the circuit court of Giles county, Virginia.

18 STATE OF VIRGINIA, } *To wit:*
County of Giles, }

I, B. P. Watts, clerk of the county court of Giles county and State aforesaid, do certify that the foregoing is a true transcript of the record and proceedings in a certain motion made in said court by C. E. Wingo, plaintiff, against George S. Williams, defendant, with

all things touching the same, as fully and wholly as they now exist among the records of my office

Given under my hand the 30th day of June, 1897.

B. P. WATTS,
Clerk Giles County Court.

And at this day, in said circuit court, to wit, on the — day of October, 1897, Hon. R. C. Jackson, judge, presiding.

GEO. S. WILLIAMS, Appellant,
vs.
C. E. WINGO, Appellee.

On appeal from the judgment of the county court of Giles county in establishing a ferry near Egglestons, in said county.

19 This day came the parties, by their attorneys, and the appellant renewed his motion to quash the application for the ferry and the report of the reviewers; which motion is overruled and the appellant excepted; and the court, having maturely considered the transcript of the record of the judgment of the county court of Giles county, Virginia, and having fully heard the evidence offered and the arguments of counsel in this cause, doth find that there is no error in said judgment of said county court in establishing the ferry aforesaid. Thereupon the defendant, George S. Williams, moved the court to set aside said finding & to grant him a new trial and an arrest of judgment, first, for errors apparent on the face of the record; 2nd, because said finding is contrary to the law and the evidence; but the court overruled said motion & the defendant excepted; which exception is signed, sealed, and made a part of the record. Thereupon it is considered by the court that the said judgment of the county court be affirmed, and that the appellees recover against the appellant *their* costs by *them* in this behalf expended.

20 MEMO.—The court certifies that in the trial of this cause the applicant relied on an act of the General Assembly of Va., approved March 5th, 1895, entitled "An act authorizing the county court of Giles county to charter a ferry across New river at a point near Egglestons Springs," & there was drawn into question the validity of said act on the grounds that said act was repugnant to article 1st, section 10, of the United States Constitution, as to impairing the obligation of contracts, and repugnant to 14th amendment of same Constitution & repugnant to sections 14 & 15, article 5th, of the constitution of the State of Va., & the decision of this court was in favor of the validity of said act.

The appellant having expressed his intention to appeal from the judgment of this court to the supreme court of appeals of this State, this judgment is suspended for 60 days upon the appellant executing bond & security before the clerk of this court in his office in the penalty of $300.00, conditioned according to law.

MEMO.—The appellant tendered his bill of exceptions to the
21 rulings of the court in the cause, which is signed, sealed, and made a part of the record.

22 *Facts Proved in Ferry Case.*

Act of assembly under which Wingo's application — based offered in evidence.

GEO. S. WILLIAMS, Appellant,
vs.
C. E. WINGO, Appellee.

On apppeal from judgment of county court in establishing a ferry near Egglestons, in Giles Co., Va.

Testimony for C. E. Wingo.

W. E. P. LUCAS: I live at Maybrook, in Giles Co., 3½ miles from proposed ferry; am a farmer; have recently gone over road leading to proposed ferry, and it is good road; landings of ferry good, and superior to Williams' landings, because grade is better and teams can pull bigger loads. It would be a great public convenience to have proposed ferry. Williams' ferry manages to get everything over, but sometimes persons have to wait. The approach on east side of river to the Williams ferry undesirable because of steepness. From point of junction the road to depot by proposed route ¼ to ⅓ mile shorter and better grade, and larger loads could be hauled.

Proposed ferry a great convenience to Egglestons Springs
23 Hotel property. Williams keeps good ferry, well equipped. I think it would average $3 or $4 per day. Every time I go there some somebody is crossing. The Williams ferry can accommodate the patronage, but the proposed ferry would be a public convenience.

G. W. HINES: Am justice of peace; live at Newport, Va. The establishment of the road will be an advantage to the public as far as Craig County line. It is a continuous valley to Newport and a good deal further. The country is thickly populated and good farming community. Williams' ferry can cross everybody, but wagons sometimes have to wait. I believe the community at large will be better accommodated, because the road to proposed ferry is a better road. The road closely approaching Williams' ferry very steep and dangerous. The landings at proposed ferry are very much better than at Williams' ferry. They are easy of access and very gradual grade. The Williams ferry can accommodate the patronage, but the proposed ferry would be a public convenience.

24 C. P. HUDSON: Station agent N. & W. R'y Co. since 1891. From what people say it would be a benefit to have proposed ferry. The banks are all right, in good shape, and not steep on either side. The east landing on Williams' ferry is very steep and

two heavy curves in road immediately approaching it. The visitors to springs come and go by boats; very inconvenient to get baggage down embankment to boats; have heard good many people kick on the way of getting to the springs. If N. & W. or Franklin should prohibit springs' boat from landing, don't know how the springs' people would get visitors and their baggage to the hotel. The road from springs around over tunnel very steep and rough. Five to ten wagons per week come to station from town of Newport, and daily hack line. Business to this station comes all the way from Craig county; don't know anything about any private road which springs' people could use. Springs have been averaging from 30 to 50 visitors each year till this year, when there are not so many. Williams' ferry can accommodate the patronage, but proposed ferry would be a public convenience.

25 JNO. F. WALKER: I reside near Egglestons; am a farmer and merchant, and am one of the supervisors for Giles county, Va.; have known that county 25 or 30 years. The proposed ferry would be a public benefit because it would be a better outlet. It would give better accommodation. It is a better road and better ferry. The grade at Williams' landing is steep, on a curve, and there is another curve near and on very steep grade, and steep and dangerous road up the hill. If wagon or any vehicle should get over, it would go to the bottom, for there is nothing to stop it. Road approaching near Williams' ferry is narrow, and switches have to be made for wagons to pass. The road on Wingo's road is almost level until the springs are reached. Landings of proposed ferry fine. They are sandy banks and do not get muddy. Tunnel Hill road is very steep. The establishment of proposed ferry would be a great advantage to New River, White Sulphur springs. The springs benefit the people very much in furnishing a market
26 for farm products. There is a fine farm in connection with springs. A road could not be made to cross at old ferry and go to depot because of cliffs and narrowness of space between railroad track and river. Lizzie Fry, Philip Long, Geo. S. Williams, and James Fry own the land between the Williams ferry and Wingo's land. I think Geo. S. Williams owns water front down river. 1¼ miles from springs to depot over tunnel; less than ½ mile from springs to depot by proposed ferry. Capt. Eggleston ran springs many years and refused to allow road to run through lawn; road now goes through lawn of springs property. The proposed ferry would be a great benefit to Sinking Creek and Newport country. It is better route and location for ferry and road than Williams' road & ferry. Good road could not be built around land of Lizzie Fry & *als.*; 71-pole road pretty rough and steep; have seen boats hang up in river at Williams' ferry quite often; have seen a good many teams hang up at ferry; saw boat hang there this week.

27 C. E. STAFFORD: Lived in vicinity all my life; am physician and practical surveyor. Depot to landing of proposed ferry, 42 poles; proposed landing to springs, 93 poles; private farm

road, 71 poles; point of junction to Williams' ferry, $1\frac{43}{100}$ miles; Williams' ferry to depot, 54 poles; distance from springs by present public road by junction to depot, over 2 miles; springs to depot by proposed ferry, $\frac{57}{100}$ mile. At present the only public way they can get from springs to depot is by tunnel or Williams' road; $1\frac{1}{2}$ miles by tunnel, and road abandoned and rough and steep. The establishment of the ferry would be a public convenience. The road would be a good one all the way. Average elevation of Williams' road, $6\frac{1}{1}°$; average elevation of proposed ferry road, $3\frac{7}{6}°$; Williams' landing steep and smooth; highest degree on road to proposed ferry, 6°. Landings about same, but not so steep at proposed ferry; better approaches to boat. No one would be inconvenienced by establishing proposed ferry or damaged except Geo. S. Williams.

28 M. B. FRANKLIN: Live at Eggleston; one party in interest; landings of proposed ferry good on both sides; better route than Williams' ferry; public convenience; water well suited to cable, which will be used if ferry is established. To go to Egglestons Springs from depot it is $1\frac{1}{2}$ to 2 miles by tunnel road or G. S. Williams' road; proposed ferry nearer and better route for citizens living in Newport & vicinity; expect to get part of profits of proposed ferry, as I own one of the landings. Six families live on Springs farm. Williams' ferry can accommodate the patronage, but proposed ferry would be a public convenience.

JAMES FRY: Williams' road established after ferry; ferry first established connecting with road up the river. Proposed ferry is in good place for ferry; landings good. I attended ferry for 18 mos. Live adjacent to Williams' ferry. Good horses can pull out, but sorry ones stall. I own first lot below Williams' ferry; G. S. Williams, second; Long, third, and Lizzie Fry, fourth. Water right below me belongs to G. S. Williams. My lot runs short dis-
29 tance below landing of Williams' ferry. Williams' road very steep, bad, and muddy in winter time. Williams' ferry can accommodate all the patronage, but the proposed ferry would be a public convenience.

F. E. DUNKLEE: Live at Newport; am a merchant; get all my goods from Eggleston depot, and run daily hack line there, except Sunday, & ship all my produce from that point. I think proposed ferry and route better; grade better and distance shorter and landing on east side better than on same side of Williams' ferry. On approaches to Williams' ferry I use rough locks in winter to keep wagon from slipping over embankment. Williams' road gets very muddy. Have been over road leading to proposed ferry frequently, and think it is safe without rough locks. Two ferries would make cheaper ferriage. No grade on proposed road as heavy as on Williams' road. The proposed ferry would be a great public convenience; would give 5 cts. more per trip at proposed ferry. With

a difference of 10 cts. per trip, with as many teams as I run,
30 it might be an inducement to go by Williams' ferry; shipped
30 loads apples in one day this year and ship produce by car-load. Merchants and farmers at Newport and on up into Craig ship produce by that route. Williams' ferry can accommodate the patronage, but the proposed ferry would be a public convenience.

Ed. Bland: I live at Egglestons Springs; am a ferryman and will apply for the position if proposed ferry is established. Proposed ferry as good as could be gotten on New river. Guests and baggage for the springs are taken down the embankment behind the depot and taken down in boats. Geo. S. Williams notified them to stop carrying guests or baggage on boats. It is almost impossible to get over tunnel road with vehicle; have to go by this or Williams' road to get to springs Less than half mile to springs from depot by proposed ferry. Williams' ferry can accommodate the patronage, but proposed ferry would be a public convenience.

Dr. C. C Wingo: Approaches to proposed ferry good.
31 Sand bottom, & does not get muddy. Road to same, good limestone bottom. Am agent for C. E. Wingo, owner of springs property. Have begun improvements on property & built stable, crib, porch, and other improvements, and will have 8 or 10 men at work until next June 1st building and repairing springs property. No way out for springs people except over tunnel or by Williams' road. Good landing, and have never known horses to scare. It would be a public convenience. 530 acres of land in springs property cost at judicial sale $8,100. No guests there this summer. Williams notified us to stop carrying our guests and baggage in boats before this litigation was begun. Williams' ferry can accommodate patronage, but proposed ferry would be a public convenience.

C. P. Tinsley: Lived 2½ miles from Eggleston 24 years. Proposed ferry would be a public convenience; better and nearer way to depot; landings good and approaches accessible; road leading to it a good one, easily kept up; have worked it and was over it
32 last week: very steep at Williams' ferry; can't pull half load out. Proposed ferry give- better and more convenient route, and might reduce ferriage.

D. A. French: Mouth — tunnel to proposed ferry landing, 38 poles; ferry landing to railroad, 7½ poles; G. S. Williams, ferry to railroad, 16 poles.

Wade Williams: Live on Sinking creek, about ¾ mile from Egglestons Springs; have hauled lumber over the proposed ferry and had no trouble of any kind; have crossed at Williams' ferry, and at times found it muddy; have seen teams hang there; road from proposed ferry good and grades easier than Williams' road. I have crossed at proposed ferry with loads when trains were passing, and never had any difficulty or trouble. Williams' ferry can accommodate the patronage, but proposed ferry would be a public convenience.

Records introduced showing the establishment and acceptance of road leading to and beyond proposed ferry.

33 *Witnesses for Geo. S. Williams.*

W. D. STRALEY: Live near Egglestons, 3 miles; have known Williams' ferry since it was established. It is a good ferry—good boat and good service. I think every one can get to G. S. Williams' ferry; don't know income; can't answer whether two ferries could be maintained; good deal of ferriage and large country and might sustain both. Trains coming out of tunnel might scare horses. One ferry will answer all public necessities.

JAMES HOGE: Am county surveyor; have been for 14 years; think Williams' ferry would render best service; Wingo ferry dangerous, but consider all ferries along river dangerous; landing on west side in 7 poles of R. R. and runs 52 poles; from 7 to 12 poles of R. R. in open view; don't consider that tunnel cuts any figure. It is too far off, and, judging by Pembroke ferry, it is not dangerous; would cross with my horse at proposed ferry, but not my team. Williams' ferry would cross everything ordinarily. It would reduce rates of ferriage and be a convenience in getting to
34 depot to a person at Egglestons Springs, but the present ferry answers all the demands of the public.

Average grade of Williams' road, 4.69°.

Average grade of proposed road, 4.98½° from old storehouse up.

Average on all of Williams' road, 3.15°.

Average on all of proposed road, 3.03°.

Junction of roads to Williams' ferry, 409 poles.

Junction of roads to proposed ferry, 341 poles.

Old road, highest grade, 9½°.

Williams' road, highest grade, 8¾°.

Williams' landing, east side, 12½°.

Proposed landing, east side, when I measured it was 13¾°, but I have not been there since the landing and road were finished & do not know its present grade.

Farm road, 71 poles, about 4°, but little difference in repairs of Williams' road and road leading to proposed ferry.

From Williams' ferry to proposed ferry, ⅓ mile.

From old ferry at springs to proposed ferry, ⅜ mile.

Springs by junction to depot, 689 poles.

Springs by proposed ferry to depot, 152 poles; difference, 1⅜ miles; but the distance of 329 poles from springs to depot
35 by the private road & by the route up the river to the Williams ferry, if opened, would be 257 poles.

That the west landing of proposed ferry was not at Eggleston depot, but was 52 poles from depot in northerly direction, as shown by map filed and made by him as surveyor, which is made a part of the record.

G. S. WILLIAMS: Land around ferry belonged to Frys; own all but three lots; don't own J. E. Fry's, Margaret Long's, and Elizabeth

Fry's lots, which lie between Williams' ferry and proposed ferry; own a strip along water front on all except short distance. There was a rock in ferry when I bought it, but I had it blasted out; small rock there now, but is below ferry and boats don't strike it at ordinary tide, only when boat is allowed to come below ferry; have hauled rock and filled steep places; have seen horses back there, but Dunklee's hack never stalled. Williams' road was established on petition and was resisted by Capt. Eggleston; road cost me $75.00 to lawyers; Williams' road one of the best in the country.

56 After rain it is sloppy on top, but no deep mud; east bank of Williams' ferry better than west bank of same ferry; don't want competition in my ferry; proposed to allow Dr. Wingo and his guests to run boat for their use & convenience free, & this was before this litigation was begun, and proposed to give them road to my ferry; have a store at ferry and ferry customers free, but this don't amount to 50c. per month. Ferry pays $6.00 per week. Last week it paid $20.00; have heard that Bishop & Munsey pays $200.00 per year; have known it for forty years and think 20 guests per year an average attendance. My ferry and improvements cost $5,000, and, in my judgment, the establishment of the proposed ferry would absolutely destroy my property; that my ferry affords all the accommodations the public require. My ferry is well equipped with boats, cable, and hand always ready to serve the public; that while the order establishing the ferry gives me the right to charge a wagon and two horses 25 cts. each way, I have been charging only 30 cts. both ways.

C. W. STAFFORD: G. S. Williams introduced C. W. Stafford, who proved that he was raised near Eggleston, & has known the

37 surroundings all his life, & is well acquainted with Williams' ferry, and the landings are good, except that the landing on east side is a little steep; that he crossed there without difficulty. The road is fairly good; that he was not acquainted with the new landings; that the distance by proposed route and ferry was a little shorter than Williams' route, but that Williams had a good ferry and good road & gave to the public all necessary accommodations.

JOHN PORTERFIELD: Lives 4½ miles from Eggleston, near Maybrook; is a teamster; that he likes the landings at Williams' ferry, but that the east landing is steep, but the road is good to Williams' ferry, being an average country road, though steep in places. The public does not need any other ferry than Williams' ferry. He never crossed at proposed ferry and had never examined the same.

JAMES SINDOW: Is road commissioner for Pembroke district, in which both ferries are located, and familiar with Williams'

38 road and the road to proposed ferry, but had not been over road to proposed ferry since it was improved; that he saw no necessity for the new ferry, the present one answering all the public necessities; that it is a little nearer, probably 300 yards; that unless the county was a great deal richer than it is he saw no necessity for

the county keeping up two parallel roads, they being about 71 poles apart; that the private road gave the springs a better road than the proposed road.

C. L. JOHNSTON: Ferryman at Williams' ferry. Patronage had been $4.50 per week, but is now more; can't tell what it is. He keeps no books. There is a great deal of crossing there of wagons and vehicles of various kinds, stock, &c., &c. Balky horses sometimes stall at Williams' ferry; suppose you would call it a safe ferry. It accommodates all public needs; safe boat, cables, landings, &c. There is a rock just below the cable. Sometimes, when the rope is too long & the water low, boats touch rock which is below ferry. $19.00 to $20.00 per month he gets for his part and divides at
39 end of week. He gets half for running ferry. The custom to Williams' store and Williams' family and teams pass free. This year the tan-bark wagons paid about $50 ferriage.

The foregoing *is* all the facts and all the evidence proved upon the trial of this cause.

R. C. JACKSON.

And, this being all the evidence, the court doth find there is no error in the order of the county court establishing said ferry; & thereupon the defendant moved the court to set aside said finding and grant him a new trial, first, for errors apparent on the face of the record, and, 2nd, because said finding was contrary to the law and the evidence; but the court overruled said motion, and the defendant excepted; and thereupon the defendant moved an arrest of judgment for the same reasons, and the court overruled said motion and entered up judgment affirming the order of the
40 county court; to which action of the court in overruling said motions and in entering up judgment affirming the said order of said county court the defendant at the time excepted and tenders this his bill of exceptions and prays that same may be signed, sealed, and made a part of the record, which is accordingly done.

R. C. JACKSON. [SEAL.]

C. E. WINGO
ads.
G. S. WILLIAMS.

On appeal from the circuit court of Giles county affirming judgment of county court of Giles county establishing a ferry at Eggleston.

The following facts were agreed to on the trial of this case:

1st. The ferry now owned by G. S. Williams and referred to in this case is operated by the said G. S. Williams at the point at which it was originally established, in the year of 1880, by the county court of Giles county, Va., and *these* state of facts were reduced to writing, which is now lost, but which should be a part of the record.

R. N. FRENCH,
Of Counsel for C. E. Wingo.
W. J. HENSON,
Of Counsel for G. S. Williams.

VIRGINIA, }
Giles County, } *To wit:*

I, B. P. Watts, clerk of the circuit court of said county, hereby certify that the foregoing is a true transcript of the record and proceedings in the trial of an appeal from the county court of said county, in which Geo. S. Williams is appellant and C. E. Wingo is appellee, said appeal being from an order of said county court establishing a ferry across New river, near Eggleston, in said county. The said transcript of record contains all things touching the same as fully and wholly as they now exist among the records of my office.

Given under my hand the 3rd day of December, 1897.

B. P. WATTS,
Clerk Giles Circuit Court, Va.

41 And thereupon the following order was entered by the said supreme court of appeals:

VIRGINIA:

In the Supreme Court of Appeals, Held at the Court-house of Wythe County, in the Town of Wytheville, on Wednesday, the 6th Day of July, 1898.

Geo. S. Williams, by his counsel, this day presented to the court a petition praying that a writ of error be awarded to a judgment rendered by the circuit court of Giles county at the October term thereof, 1897, on a writ of error to a judgment of the county court of Giles county rendered at the June term thereof, 1897, on a motion made by C. E. Wingo in said court to establish a ferry across New river, in said county, to which motion said Williams was a party defendant, and with said petition presented a transcript of the records of the judgment of said court; from which petition and records it appears that petitioner claims rights guaranteed to him by the Constitution of the United States have been violated by said judgment, and assigns such violation as error; but this court, having considered said petition and transcript, is of the opinion that there is no error in the said judgment of the circuit court of Giles county affirming the judgment of the county court of said county, and it is therefore ordered that the prayer of said petition be denied.

VIRGINIA:

In the clerk's office of the supreme court of appeals of the State of Virginia, at the court-house of Wythe county, to wit.

In obedience to a writ of error awarded Geo. S. Williams by the Hon. Melville W. Fuller, Chief Justice of United States, to the foregoing judgment of the supreme court of appeals of the State of Virginia, I, W. G. G. Lowry, clerk of the supreme court of appeals of the State of Virginia, do certify that the foregoing is a true
42 transcript of the record and proceedings in the said supreme court of appeals of the State of Virginia on an application to

said court for a writ of error to the judgment of the circuit court of Giles county, wherein the said Geo. S. Williams was appellant and C. E. Wingo appellee, as fully and as wholly as they now exist among the records of my office, and with this record I return the original writ of error and original citations, the service of which has been accepted, and a copy of the writ of error bond.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of appeals of the State of Virginia this the 11th day of February, 1899.

[Seal Supreme Court of Appeals of Virginia, Wytheville.]

W. G. G. LOWRY, *Clerk.*

43 To the honorable judges of the Supreme Court of the United States:

Your petitioner, George S. Williams, of Giles county, in the State of Virginia, respectfully represents that he is aggrieved by a final judgment of the supreme court of appeals of the State of Virginia, rendered on the 6th day of July, 1898, denying a writ of error prayed by him to a final judgment rendered by the circuit court of Giles county, Virginia, at the October term, 1897, on a writ of error to a judgment of the county court of Giles county, Virginia, rendered at the June term thereof, 1897, on a motion made by C. E. Wingo, in the said county court, to establish a ferry across New river, in said county; to which motion your petitioner is a party defendant.

A transcript of the record of the proceedings in the said courts is filed herewith.

It will be seen that your petitioner was the owner of a ferry across New river, which was established by the county court of said county in the year 1880, under chapter 64 of the Code of Virginia of 1873, which, so far as this case is concerned, was the same as chapter 62 of the Code of 1887. For convenience the references will be to the Code of 1887.

Section 1386 provided as follows:

"No court shall grant leave to establish over a water-course a ferry within half a mile of any other ferry legally established over the same water-course. If within that distance of a ferry, so established over any water-course, any person who had not, before the first day of May, eighteen hundred and forty, obtained lawful authority to do so, shall keep a ferry over the same water-

44 course, or keep a boat with a hand generally ready to carry any person or thing as is mentioned in the preceding section over the same, and shall actually carry any person or any such thing, whether for reward or not, over the said water-course, every person so offending, shall, for each month during any part of which the same may have been done, forfeit to the proprietor of the ferry so legally established, two hundred dollars. Where any association of persons is formed for the purpose of defeating or evading the provisions of this section, every member of such association shall be subject to the said forfeiture."

By act approved March 5th, 1894, Acts of Assembly, 1893 and '94, page 789, the General Assembly of Virginia enacted as follows:

"Be it enacted by the General Assembly of Virginia, That it shall be lawful for the county court of Giles county to establish a ferry at a point on New river, in said county, at a point around Egglestons Springs depot and between Egglestons Springs and Egglestons depot, on the New River branch of the Norfolk and Western railroad, Giles county, Virginia. Said court in establishing said ferry shall be bound by sections thirteen hundred and seventy-five, thirteen hundred and seventy-six, thirteen hundred and seventy-seven, thirteen hundred and seventy-eight, thirteen hundred and seventy-nine, thirteen hundred and eighty, thirteen hundred and eighty-one, thirteen hundred and eighty-two, thirteen hundred and eighty-three, thirteen hundred and eighty-four and thirteen hundred — eighty-five of the Code of Virginia; but section thirteen hundred and eighty-six of said code, so far as the distance of one-half mile is concerned, shall not apply to the establishment of said ferry at said place.

"This act shall be in force from its passage."

45 Under the latter act C. E. Wingo applied to the county court to establish a ferry at a point which was less than one-half a mile from your petitioner's ferry, and the county court, notwithstanding the objections of your petitioner, established the same, and from that decision there was an appeal to the circuit court, which affirmed the county court, and a writ of error was prayed to and refused by the supreme court of appeals, which is the court of last resort in the State.

Your petitioner is advised and avers that by the judgment aforesaid his property has been taken from him without due process of law and without compensation.

He is advised and avers that by what is now section 1386 of the Code the franchise granted in 1880 was an exclusive privilege within one-half a mile of the ferry, and that neither of the courts, nor the legislature, could authorize any other person to maintain a ferry within that distance, and that no person could maintain such a ferry unless lawful authority to do so had been obtained before the first day of May, 1840. That the privilege was exclusive see the case of Binghampton bridge, 3 Wallace, page 51. On page 53 these words in the charter of the bridge company were by this honorable court construed as giving an exclusive privilege that could not be taken away by the State:

"It shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west or east branches of Delaware river, within two miles either above or below the bridges to be erected and maintained in pursuance of this act."

The Virginia act is:

46 "No court shall grant leave to establish over a water-course a ferry within a half a mile of any other ferry legally established over the same water-course."

And then in the plainest terms it proscribes heavy penalties against any person who shall attempt, without authority obtained

before May 1st, 1840, to maintain a ferry, for reward or not, within the prescribed distance. This section made it unlawful, both for the State to authorize and for individuals to maintain a ferry, and in this respect is certainly stronger than the New York statute in the Binghampton Bridge case.

The reasoning of the court in the Binghampton Bridge case, on the question of whether the right was exclusive, will be found on page 81, where it is said:

"As there was no necessity for laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision 'that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles' is that the legislature will not make it lawful by licensing any person or association of persons to do it."

That the granting by the State of a franchise is a contract, see—

Dartmouth College *vs.* Woodward, 4 Wheat., page 415.

Binghampton Bridge Case, 3 Wallace, page 51.

That a State may grant exclusive franchises through intermediate agencies vested with that power by the legislature, see—

Wright *vs.* Nagle, 101 U. S., page 791.

When an exclusive franchise is granted the State cannot
47 violate that contract and take away the exclusiveness except by the power of eminent domain, which can only be exercised by paying just compensation.

Cooley's Const. Limitations, page 281.

Enfield Toll Bridge Co. *vs.* Hartford R. R., 2 Am. Dec., page 716.

Red River Bridge Co. *vs.* Mayor, 60 Am. Dec., p. 143.

Your petitioner assigns the following errors in the judgments aforesaid, which he is advised are cognizable by this court:

1. The act of March 5th, 1894, and the action of the county court thereunder are unconstitutional because they impair the obligation of the contract between petitioner and the State by which the ferry franchise was granted.

2. His property is taken from him by the said legislative enactment without due process of law or just compensation.

For these reasons and for others apparent upon the record to be assigned at bar, your petitioner prays a writ of error and supersedeas to the judgment of the supreme court of appeals of Virginia refusing the writ of error which he prayed from that court, and that the judgment aforesaid may be reversed and annulled: and in duty bound he will ever pray.

GEORGE S. WILLIAMS,
By Counsel.

HENSON & MASON,
ARCHER A. PHLEGAN.
Counsel for Petitioner.

48 I, W. J. Henson, an attorney-at-law, practicing in the Supreme Court of the United States, certify that in my opinion the judgment complained of in the foregoing petition of George S. Williams against C. E. Wingo should be reviewed and reversed by the said court.

W. J. HENSON.

49 IN CHAMBERS, *Dec.* 10, 1898.

Let the writ of error issue as prayed, but not to operate as a supersedeas, on plaintiff in error giving bond in the penal sum of three hundred dollars, conditioned according to law, and to be approved by the undersigned.

MELVILLE W. FULLER,
Chief Justice of the United States,
Attached to Fourth Circuit.

50 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of Virginia, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between George S. Williams, appellant, and C. E. Wingo, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construc-

51 tion of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said George S. Williams, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right

and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
MELVILLE W. FULLER,
Chief Justice of the United States.

52 UNITED STATES OF AMERICA, *ss:*

To C. E. Wingo, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein George S. Williams is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 25th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

MELVILLE W. FULLER,
Chief Justice of the United States.

53 [Endorsed:] Feb'y 1st, 1899. I hereby accept service of this process. C. E. Wingo, by att'ys, Williams Bros. & Porterfield.

54 Know all men by these presents that we, George S. Williams, as principal, and Isaac F. Williams, Hoge S. Williams, and Fleming E. Williams, as sureties, are held and firmly bound unto C. E. Wingo in the full and just sum of three hundred ($300.00) dollars, to be paid to the said C. E. Wingo, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a term of the supreme court of appeals of the State of Virginia, in a suit depending in said court between the said Geo. S. Williams, appellant, and the said C. E. Wingo, appellee, a judgment was rendered against the said Geo. S. Williams, and the said Geo. S. Williams having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said C. E. Wingo, citing and admonishing him to be and appear at a

Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said Geo. S. Williams shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) GEORGE S. WILLIAMS. [SEAL.]
ISAAC F. WILLIAMS. [SEAL.]
HOGE S. WILLIAMS. [SEAL.]
FLEMING E. WILLIAMS. [SEAL.]

Sealed and delivered in presence of—
FRANK S. CROY.

Approved by—
(Signed) MELVILLE W. FULLER,
Chief Justice of the United States.

A true copy.
Teste: W. G. G. LOWRY, *Clerk.*

55 [Endorsed:] G. S. Williams *vs.* C. E. Wingo. Copy of bond.

[Endorsed:] Geo. S. Williams, plaintiff in error, *vs.* C. E. Wingo, def't in error. Transcript of record.

Endorsed on cover: File No., 17,310. Virginia sup. court of appeals. Term No., 222. George S. Williams, plaintiff in error, *vs.* C. E. Wingo. Filed February 27th, 1899.

No. 222.

Brief of Henson for

Supreme Court U. S.
FILED
JAN 29 1900
JAMES H. McKENNEY,
Clerk.

Filed Jan. 29, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 222.

GEORGE S. WILLIAMS, PLAINTIFF IN ERROR,

vs.

C. E. WINGO.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

GEORGE S. WILLIAMS, Plaintiff in Error,

vs.

C. E. WINGO, Defendant in Error.

In Error from the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR PLAINTIFF IN ERROR.

The petition on pages 17, 18 and 19 of the printed record contains a concise statement of the case, and presents the questions involved as succinctly as we are able to present them.

The questions arising under the constitution of the United States were raised in the State courts, as appears on pages 8 and 16 of the record.

The petition on page 19 specifies the errors relied on, and which are intended to be urged.

The State statutes which are involved are also copied in the petition, pages 17 and 18.

The petition is asked to be read and considered as a part of this brief.

We claim :

I. That the right to operate a ferry is a franchise.

" Franchises are special privileges conferred by governments upon individuals, and which do not belong to the citizens of the country generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held where it is not derived from a law of the State."

Bank of Augusta vs. Earle, 13 Peters, 595.

" It is a conceded power or duty of government to provide and maintain highways, bridges, ferries, . . . and in various other ways to make provisions for the comfort and convenience of the public. When these duties are not directly assumed by the government they may be delegated.

"But the inducement to others to undertake them must usually be some such consideration as the grant of more or less exclusive privileges. While no rule of law demands it, they are usually conferred upon corporations."

8 Am. & Eng. Ency. of Law, pp. 585–6. Franchises.

"The parties respectively assumed, and so the court below held, that the establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by *contracting* with *individuals*. We deem this general principle not open to controversy."

Mills vs. St. Clair Co., 8. How. 581.

"Such a franchise is the creation of the sovereign power, and no one can exercise it without the consent of the State."

Miss. River Bridge Co. vs. Lonergan, 91 Ill., 513.

II. "The franchise being a contract between the State and the citizen, the rights granted to the citizen cannot be taken away unless the State reserved the power to take them away."

Dartmouth College vs. Woodward, 4 Wheat., 415, and the many cases which follow it.

This court declared a charter to a gas company to be "a contract between the State and its corporators, and within the provisions of the constitution prohibiting legislation impairing the obligations of contracts, and therefore equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators."

N. O. Gas Co. vs. Louisiana Light Co., 115 U. S. 660.

The case last cited (see page 665) recognizes the right of a State to grant the exclusive privilege to conduct a ferry, or to do any work for the public which the State might undertake to perform.

If the foregoing principles are sound, it only remains to show:

III. That the State granted the exclusive privilege to Geo.

S. Williams, the petitioner, to operate a ferry within the territory in which the courts of Giles county have authorized C. E. Wingo to establish one.

That Mr. Wingo's ferry is within one-half mile of petitioner's ferry is not disputed. The distance is one-third of a mile. Testimony of James Hoge, page 13.

By chapter 64, Codes of 1849 and 1873, and chapter 62, Code of 1887, the legislature conferred upon the courts the power of granting ferry privileges. No other power but the legislature could grant them.

When Mr. Williams obtained his franchise in 1880 it was with a distinct legislative declaration, which was a part of the same act and chapter which authorized the court to grant it, that no court should grant leave to establish another ferry within half a mile of his; and that if any person, without authority lawfully acquired prior to May 1, 1840, should exercise the rights, or perform the duties of a ferryman within one-half mile of his, he (Williams) should have the right to recover $200 for each month his privileges were encroached upon.

It was upon the faith of this legislative agreement that he expended his money, in preparing and maintaining the landings and the boat, and keeping the necessary laborers, and that he for eighteen years performed the duties to the public which his franchise imposed upon him.

If no court could grant the leave, there was no power which could do so, unless the legislature itself had that power. A person might very well be willing to assume a duty, for privileges which the legislature alone could revoke, and be entirely unwilling to do so if they could be revoked by a county or circuit judge, at any term of the court and under local influences and prejudices, which would not and could not operate upon the legislature.

A legislative committee might, we believe would, have taken a very different view of the evidence, in this case, from that taken by the trial judge. Again, the increased expense and difficulty of getting witnesses before a committee of the legislature, the longer time between the sessions of the legislature than between those of courts, the greater number of persons to

deliberate upon and to decide the question, are all sources of security to such a franchise.

No one can read chapter 63 of the Code of Virginia without feeling that a person obtaining a ferry franchise thereunder, would believe that he was obtaining an exclusive privilege within the half-mile limit, and that he could safely invest his money and labor on that belief.

The Act of March 5, 1894, not only violates the spirit of the Code, but the very letter. "No court," says the Code, "shall grant leave to establish a ferry." "It shall be lawful," says the Act of March 5, 1894, "for the county court of Giles county to establish a ferry."

Argument cannot make this contradiction any plainer.

Section 1376 is not only a contract, that the courts shall not be empowered to grant a rival ferry within half a mile, but it is also a contract that the legislature will protect the enjoyment by requiring every one who keeps a rival ferry, or does the equivalent thereof, who prior to May 1, 1840, had not obtained legal authority so to do, to pay to the proprietor of the legally authorized ferry two hundred dollars per month.

The latter clause of the section applies to all persons who did not have authority prior to May 1, 1840. It contains no exception in favor or those who might get authority after May 1, 1840. Its terms apply to those who might receive a legislative grant of the franchise after 1840, and makes such an one equally with one who keeps a ferry without the semblance of authority, liable to the proprietor of the ferry established by the court, for two hundred dollars per month.

The State has no interest in the two hundred dollars forfeit. In granting the ferry franchise, the State, as a part thereof and for the same consideration, granted the right to the forfeit, which thereby became a vested and valuable right of private property, which the State could not, by any of its departments, nor all combined, take away without making compensation.

The Act of March, 1894, takes away the right of action for the forfeit, and provides no compensation therefor. That the legislature granted such a right, raises a very strong implication that it intended to make the privilege exclusive, and to deprive

itself of the power of establishing another ferry within the half-mile limit.

Is it possible that the legislature intended to reserve to itself the right to do a thing which it was prohibiting by a penalty as heavy as two hundred dollars per month?

In the State courts the defendant in error relied on these words in the case of Somerville vs. Wimbish, 7 Grattan, p. 231:

"It is true that by the Act of 1840 [which is now Section 1386 Code], in order to prevent injurious competition, the courts are prohibited from granting leave thereafter to establish a ferry over any water-course within one-half mile, in a direct line, of any ferry legally established over the same water-course. But if that prohibition embraces opposite ferries, as to which we express no opinion, it was no surrender of the legislative power to establish such opposite ferries, whether directly or through the agency of the courts."

To this we reply:

That case in no way involved the question of contract. There was no pretence that an exclusive privilege was granted with the Somerville ferry; on the contrary, the Act under which it was established contained an express provision that it should be lawful for the county court to constitute opposite ferries. That ferry was established seventy years before the act of 1840, and as Judge Baldwin truly said, contained no surrender of the legislative power over the subject, because the subject was not protected by the sanctity of a contract.

As the question whether or not the grant of a ferry after the passage of the Act of 1840 conferred a privilege which the courts could not be authorized to take away was not before the court, it is not to be presumed that Judge Baldwin was speaking to that question.

We respectfully submit that the judgment complained of should be reversed.

HENSON & MASON.
PHLEGAR & JOHNSON.

Office Supreme Court U. S.
FILED
MAR 19 1900
JAMES H. McKENNEY,
Clerk

No. 222.

Brf. of Williams for D. C. Tmo.

Filed Mar. 19, 1900.

In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 222.

GEO. S. WILLIAMS, PLAINTIFF IN ERROR,

versus

C. E. WINGO, DEFENDANT IN ERROR.

In Error from the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR DEFENDANT IN ERROR.

MOTION TO DISMISS.

JOHN A. GOOCH, PRINTER, WYTHEVILLE, VA.

In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 222.

GEO. S. WILLIAMS, PLAINTIFF IN ERROR,

versus

C. E. WINGO, DEFENDANT IN ERROR.

In Error from the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR DEFENDANT IN ERROR.

MOTION TO DISMISS.

For the defendant in error, I move the court to dismiss this writ of error as having been improvidently awarded in this: That it does not appear from the printed record that there was any duly certified copy of the record from the State Courts presented to this court at the time of or before the granting of said writ. The writ was granted on December 10th, 1898; (see p. 20 of record.) The only certificate of the Clerk of the Supreme Court of Appeals, is to be found on page 17 of the printed record, and is dated the 11th day of February, 1899, more than two months after the writ was granted, and this certificate, on its face, shows that it was made after the writ was granted, and the court's attention is especially called to the fact that the petition to the Supreme Court of Appeals of Virginia, referred to in the order

of said court of date July 6th, 1898, does not appear in the printed record; (see p. 16 of printed record.) On behalf of the defendant in error, I applied to the Clerk of the Supreme Court of Appeals of Virginia, at Wytheville, for a copy of said petition for use in this case in this court, and was unable to obtain it, for the reason that it had been previously given out to W. J. Henson, of counsel for plaintiff in error.

See certificate to this effect furnished by the Clerk, and which is as follows :

VIRGINIA.

In the Supreme Court of Appeals, at Wytheville, this February 9th, 1900 :

This is to certify that, Judge Sam'l W. Williams, as counsel for C. E. Wingo, this day applied to me in my office, at Wytheville, Virginia, for a copy of the petition of Geo. S. Williams, to the Supreme Court of Appeals of Virginia, mentioned in the order of said court entered on the 6th day of July, 1898, in the case of said Geo. S. Williams, petitioner, vs. C. E. Wingo, and that I was unable to furnish him a copy of said petition, because the same is not on file in my office; because the same has been heretofore delivered to W. J. Henson, counsel for said C. E. Wingo, together with the original transcript of the record from the court below.

Given under my hand as Clerk of the Supreme Court of Appeals of Virginia, at Wytheville, this 9th day of February, 1900.

W. G. G. LOWRY,
Clerk.
By J. Norment Powell, Deputy Clerk.

The writ in this case should be dismissed, because it does not appear from the record that any of the questions necessary to give this Court jurisdiction were actually raised and passed upon by the State Court. In discussing this question, Professor Minor, in his Institutes, Vol. 4, p. 359, states the law to be : "Someone of the questions stated in the section must appear to *have actually arisen.* It is not sufficient that such a question *was involved.* It must appear to have been *actually* and *distinctly* raised." And to support

this proposition, he cites :

1st. Abb. U. S. Practice, 331;
Farney vs. Towle, 1st. Black, 350;
Hamilton & Co., vs. Massachusetts, 6 Wal., 332;
The Victory, 6 Wal., 382;
Parmalee vs. Lawrence, II Wal., 36;
Marquese vs. Bloom, 16 Wal., 351;
Murry vs. Charleston, 96 U. S., 442;

And on the same page, the author further says: "Some of the questions stated in the section must appear by *the record* to have been *decided by the State Court* in the manner contemplated." And for this proposition, he cites :

1st. Abb. U. S. Practice, 331;
William vs. Norris, 12 Wheat., 117;
Tarver vs. Keach, 15 Wal., 67;
R. L. Rhodes vs. Richmond, 15 Wal., 3;
Solomons vs. Graham, 15 Wal., 209;
Hall vs. Jordan, 15 Wal., 393;
Com. Bank vs. Rochester, 15 Wal., 639;
Stevenson vs. Williams, 19 Wal., 572;
Murry vs. City of Charleston, 96 U. S., 442.

It nowhere appears from the record that the question as to whether the Act of the Legislature, under which the County Court of Giles established the ferry in this case, was, or was not repugnant to the Constitution of the United States, was ever raised by any pleading or otherwise in any tangible way in the State Courts.

It nowhere appears in the record that any rights whatever under the Constitution of the United States was "specially set up or claimed" in the State Court, by the plaintiff in error, either by way of demurrer, plea or otherwise.

Chicago R. Co. vs. City of Chicago, 164 U. S., 454:
Oxly Statve Co. vs. Butler Co., 166 U. S., 648;
U. S. Rev. S., Sec. 709.

MERITS.

The Virginia Statutes in regard to the establishment of ferries, are plain and simple, and have been strictly complied with in this case, and no question in regard thereto can arise in this court. In the petition filed in this court, page 17 of printed record, the Statute on which the plaintiff in error seeks to base his claim in this court as the same now appears in the Virginia Code of 1887, is duly copied, but the history of this legislation is not given. This Statute was first passed March 5th, 1840; (see Acts of Assembly, 1839-40, p. 58,) and the Statute as thus passed, is as follows:

"An Act to Amend the Several Acts Concerning Ferries."

(Passed March 5th, 1840.)

"First. Be it enacted by the General Assembly that, it shall not be lawful for the court or any county to grant leave to establish a ferry over any water courses within one-half mile, in a direct line, of any other ferry legally established over the same water course; and if any person not having heretofore obtained lawful authority to do so, shall keep a public ferry over any water course within the distance aforesaid of another ferry, over the same water course legally established and regularly kept up, or shall keep a boat or boats, with assistants or ferrymen generally prepared and in attendance to carry persons, horses or carriages of any kind, including wagons and carts, and shall actually carry the same, or any of them, whether for reward or not, over any water course within one-half mile of any ferry which may at the time be legally established and regularly kept up over the same water course, every person so offending, shall, for every such offence, forfeit and pay the sum of two hundred dollars, to be recovered by action of debt, in the name and for the use of the proprietor or keeper of the ferry which shall be within the distance aforesaid, provided that the said penalty shall not be recoverable for the commission of such an offence, oftener than once in any one month, and that nothing herein contained shall be so construed as to prevent and person from

carrying the members of his own family or persons in his employment, and his own property across any water course in his own boats, or any merchant or miller from carrying free of toll, any person bona fide engaged in the actual transportation of grain, timber, or other produce, and necessarily accompanying the same, to or from his store or mill." This act has been in force in Virginia ever since its passage in substantially the same manner as it now appears in the Virginia Code.

The only ground on which the plaintiff in error seeks to rest his case in this court is that the judgment of the state court is repugnant to Sec. 10 of Art. 1 of the constitution of the U. S., which prohibits any state from passing any law impairing the obligation of contracts. It is respectfully submitted that before this question can properly arise in any case, the existence of a contract which can be, or has been impaired, must be clearly shown. No such contract has been shown in this case. No contractual relations whatever, has been shown to exist in this case between the plaintiff in error and the State of Virginia, or between the plaintiff in error or anyone else, touching the subject matter of controversy in this suit. That the statute referred to and relied on by counsel for plaintiff in error does not of its own force and effect create a contract, has been settled by this court in the case of Wheeling and Bellmont Bridge Co., vs. Wheeling Bridge Co., 138 U. S., 287-293. This case and the principles therein settled is confidently relied upon by the defendant in error as being conclusive of all questions raised, or even suggested, in the record of this case, and it is therefore not deemed necessary to enter into a detailed or lengthy reply to, or criticism of the many cases and authorities cited by plaintiff in error. Suffice it to say that upon a full and fair investigation it will be found that none of the cases or authorities cited, will in the least, shake the full binding force and authority of this case. As to the Virginia case of Somerville vs. Wimbush, 7 Grat. 231, commented on in the brief of counsel for plaintiff in error, it may be said that this case is authority for the position that the Virginia legislature has full power to establish a rival ferry in immediate juxtaposition with an existing ferry, and in this connection the attention of the court is called to the fact that the Virginia statute relied on by

plaintiff in error, does not even purport to be binding on the legislature, but only on the court, and by the very terms of the statute, leaving the legislature with full and unimpaired power to exercise all of its inherant powers in legislating on the subject.

Upon the whole case it is confidently submitted that there is no error in the record in this case and that the same should be affirmed.

SAM'L W. WILLIAMS,
For Defendant in error.

No. 223.

Def. of Gans for D. E. (on mo.)

223

FILED
MAR 16 1900
JAMES H. McKENNEY,
Clerk.

Filed Mar. 16, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES.

BLANCHE I. HARRISON AND WALTER H. HARRISON, HER HUSBAND, *Plaintiffs in Error*,

vs.

FRANKLIN J. MORTON, *Defendant in Error.*

Answer of the Defendant in Error to the Motion of the Plaintiffs in Error, Filed on March 12, 1900, Asking for Additional Time within which to Print the Record Herein.

EDGAR H. GANS,
Solicitor for Defendant in Error

IN THE

SUPREME COURT OF THE UNITED STATES.

BLANCHE I. HARRISON AND WALTER H. HARRISON, HER HUSBAND, *Plaintiffs in Error*,

vs.

FRANKLIN J. MORTON, *Defendant in Error*.

Answer of the Defendant in Error to the Motion of the Plaintiffs in Error, Filed on March 12, 1900, Asking for Additional Time within which to Print the Record Herein.

The defendant in error desires to object to the granting of any extension of time for the printing of the Record in this cause, and asks leave of the Court to file this paper stating the grounds for such objection.

The defendant in error had no notice whatsoever that the motion of the plaintiff in error for an extension of the time for printing the Record was to be presented to this Court on Monday, March 12th, 1900. It is true that on or about March 9th, 1900, a copy of the motion was served on counsel for the defendant in error, but there was no notice as to when the motion would be submitted, and even if such notice had

been given on March 9th, 1900, there was not sufficient time allowed the defendant in error between that date and March 12th, 1900, to prepare and print an answer to said petition. The defendant in error therefore respectfully submits that he should be allowed to file this paper showing his objections to the granting of additional time for printing the Record. These objections are as follows:

I.

This is a case in which the plaintiffs in error are in possession of certain property, to wit, two dwelling houses in the city of Baltimore; the defendant in error is the holder of an equitable mortgage on each of said houses, and on Jan. 4, 1897, began proceedings to foreclose said mortgages. These proceedings have been delayed by the plaintiff in error for three years. During all this time the plaintiff in error has remained in possession of said houses, and the defendant in error has been paying all expenses thereon, including taxes, water rents, ground rents, etc.

II.

That the appeal bond which the plaintiff in error has given is worthless; that since the said bond was filed judgments have been rendered and are now outstanding and unsatisfied against both of the sureties thereon. Certified copies of these judgments are filed herewith.

III.

That it is manifest on the face of the Record transmitted to this Court that there is no federal question involved in this case. That the proceedings herein began with a bill of complaint filed in the Circuit Court for Baltimore City; that upon the filing of this bill a subpœna was issued for the defendants; that this subpœna was duly returned by the Sheriff of Baltimore City, with the endorsement, "*summoned ambo;*" that the sole contention of the plaintiffs in error is that they were not in fact summoned, and that therefore the

subsequent proceedings have the effect of depriving them of their property without due process of law. This contention was decided adversely to the plaintiffs in error both in the Circuit Court for Baltimore City and in the Court of Appeals of Maryland. This Court, we submit, will not go into a question of this kind. The constitutional provision is "nor shall any *State* deprive any person of life, liberty or property without due process of law." Certainly a State cannot be deemed guilty of a violation of this constitutional obligation simply because one of its Courts may have made an erroneous decision as to a question of fact. The State does its full duty when it passes a general law governing its Courts, and providing for due notice to the defendant in civil suits by personal service of a subpœna.

Arrowsmith vs. Harmoning, 118 U. S. 194.

There is no pretense that the laws of Maryland do not so provide, and therefore we submit that this case is one which in any event should not be entertained by this Court.

IV.

To allow the plaintiffs in error sixty days additional time in which to print the Record would simply be to carry the case over until the next term and allow said plaintiffs in error to occupy said property for several months at the expense of the defendant in error.

And as in duty,

EDGAR H. GANS,

Solicitor for Defendant in Error.

WILLIAMS *v.* WINGO.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 222. Argued April 11, 12, 1900. — Decided May 14, 1900.

The act of the legislature of Virginia of March 5, 1840, providing that "it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one half mile, in a direct line, of any other ferry legally established over the same watercourse," was one of general legislation, and subject to repeal by the general assembly, and did not tie the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit.

By the statutes of Virginia authority was given to the county courts of the several counties to license ferries. By an act passed March 5, 1840, (Acts Assembly, 1839–1840, p. 58, c. 72,) carried, with simply verbal changes, into chap. 64 of the Code of Virginia of 1873 as sec. 23, and subsequently into chap. 62 of the Code of 1887 as sec. 1386, it was provided:

"Be it enacted by the General Assembly, That it shall not be lawful for the court of any county to grant leave to establish a ferry over any watercourse within one half mile, in a direct line, of any other ferry legally established over the same watercourse."

In 1880 the county court of Giles County gave to the plaintiff in error a license to maintain a ferry across New River. On March 5, 1894, the general assembly of Virginia passed the following act (Acts Assembly, 1893–1894, p. 789, c. 692):

"Be it enacted by the General Assembly of Virginia, That it shall be lawful for the county court of Giles County to establish a ferry at a point on New River, in said county, at a point around Egglestons Springs depot and between Egglestons Springs and Egglestons depot, on the New River branch of the Norfolk and Western Railroad, Giles County, Virginia. Said court in establishing said ferry shall be bound by sections thirteen hundred and seventy-five, thirteen hundred and seventy-six, thirteen hun-

dred and seventy-seven, thirteen hundred and seventy-eight, thirteen hundred and seventy-nine, thirteen hundred and eighty, thirteen hundred and eighty-one, thirteen hundred and eighty-two, thirteen hundred and eighty-three, thirteen hundred and eighty-four and thirteen hundred and eighty-five of the Code of Virginia; but section thirteen hundred and eighty-six of said code, so far as the distance of one half a mile is concerned, shall not apply to the establishment of said ferry at said place."

Under this act a license was given to the defendant in error to establish a ferry within less than half a mile of the ferry established by the plaintiff in error under his prior license. The rightfulness of this action was sustained by the circuit court of Giles County, and subsequently by the Supreme Court of Appeals of the State of Virginia, and to review such decision this writ of error was brought.

Mr. W. J. Henson for plaintiff in error.

Mr. Samuel W. Williams for defendant in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The contention of the plaintiff in error is that, under the laws of the State of Virginia in force at the time of such action, the license granted by the county court to him to establish a ferry created a contract between him and the State to the effect that no other ferry should be established within half a mile; and that the act of 1894 and the subsequent proceedings of the county court of Giles County impaired the obligation of that contract, and, therefore, were repugnant to section 10 of article 1 of the Constitution of the United States.

This is an obvious error. The act of 1840 was one of general legislation, and subject to repeal by the general assembly. No rights could be created under that statute beyond its terms, and by it no restraint was placed upon legislative action. When the general assembly gave to the county courts power to license ferries it by that act in effect forbade them to establish a second

ferry within half a mile of one already established, but that bound only the county court. It did not tie the hands of the legislature, or prevent it from authorizing another ferry within a half mile whenever in its judgment it saw fit. A contract binding the State is only created by clear language, and is not to be extended by implication beyond the terms of the statute. *Fanning* v. *Gregoire*, 16 How. 524, is in point and decisive. In that case the plaintiff was by an act of the Iowa territorial legislature given authority to establish a ferry across the Mississippi River at the then town of Dubuque, and the act also provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town. The city of Dubuque was thereafter incorporated, and under its general corporate powers entered into a contract with the defendant to run a steam ferryboat across the river. The plaintiff thereupon filed a bill to restrain the defendant from so doing. It was held that the bill could not be maintained, this court saying (pp. 533, 534):

"Although the county court and county commissioners were prohibited from granting another license to Dubuque, yet this prohibition did not apply to the legislature; and as it had the power to authorize another ferry, the general authority to the council to 'license and establish ferries across the Mississippi River at the city,' enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done. . . . The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it cannot be made to apply by implication."

This case was cited with approval in *Belmont Bridge* . *Wheeling Bridge*, 138 U. S. 287, in which this very statute of Virginia of 1840 was under consideration, and it was said (p. 292):

"Here the prohibition of the act of 1840 was only upon the county courts, and that in no way affected the legislative power of the State."

The case of *The Binghamton Bridge*, 3 Wall. 51, is not inconsistent. There an act of the legislature, authorizing the one bridge, contained a proviso "that it should not be lawful for

any person or persons to erect a bridge within a distance of two miles." That provision was held a part of the contract between the State and the bridge company, Mr. Justice Davis, speaking for a majority of the court, saying (p. 81):

"As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, 'that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles,' *is*, that the legislature *will not make it lawful* by licensing any person or association of persons to do it."

In the case at bar the only effect of the act of 1840, while in force, was, as we have said, to tie the hands of the county court. It operated in no manner as a restraint upon the legislature or as a contract upon its part that the State would not act whenever in its judgment it perceived the necessity for an additional ferry. The fact that in this case the special authority was given to the county court is immaterial. A general act forbidding county courts to license additional ferries is not infringed by a subsequent act giving special right to a single county court to establish a particular ferry. No promise made by the legislature by the first act is broken by the second. The judgment of the Supreme Court of Appeals of Virginia was correct, and it is

Affirmed.